FILE COPY

MAR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 753

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *Petitioner*,

v.

ALABAMA, EX REL. JOHN PATTERSON.

No. 674 Misc.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *Petitioner*,

v.

HONORABLE J. ED. LIVINGSTON, CHIEF JUSTICE OF THE SUPREME COURT OF ALABAMA, ET AL., *Respondents*.

PETITION FOR WRIT OF CERTIORARI AND/OR PETITION FOR WRIT OF MANDAMUS TO THE SUPREME COURT OF ALABAMA

ROBERT L. CARTER,
20 West 40th Street,
New York, N. Y.,

THURGOOD MARSHALL,
10 Columbus Circle,
New York, N. Y.,

ARTHUR D. SHORES,
1630 Fourth Avenue, North,
Birmingham, Alabama,
Attorneys for Petitioner.

CHARLES L. BLACK, JR.,
WILLIAM T. COLEMAN, JR.,
FRED D. GRAY,
GEORGE E. C. HAYES,
WILLIAM R. MING, JR.,
JAMES M. NABRIT, JR.,
LOUIS H. POLLAK,
FRANK D. REEVES,
WILLIAM TAYLOR,
Of Counsel.

INDEX

	PAGE
MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS	1
PETITION FOR WRIT OF CERTIORARI AND OR PETITION FOR WRIT OF MANDAMUS	3
Opinions Below	4
Jurisdiction	4
Questions Presented	5
Statement	5
Reason for Allowance of the Writ	6
Conclusion	9

INDEX TO APPENDICES

Order and Decree of Supreme Court of Alabama	11
Opinion of Supreme Court of Alabama	12

Table of Cases

City National Bank v. Hunter, 152 U. S. 512	5
Ex Parte Bradley, 7 Wall 364, 376	5
Hovey v. Elliott, 167 U. S. 409	9
McCargo v. Chapman, 20 How. 555, 557	5
National Union of Marine Cooks v. Arnold, 348 U. S. 37, 43	9
Re Metropolitan Trust Co., 218 U. S. 312	5

IN THE

Supreme Court of the United States

October Term, 1958

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, a Corporation,

Petitioner,

v.

STATE OF ALABAMA, *ex rel.* JOHN PATTERSON,

Attorney General.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

Now comes petitioner and moves this Court for leave to file the annexed petition for writ of mandamus under Title 28, United States Code, § 1651(a) and further moves that an order and rule be entered and issued directing the Supreme Court of the State of Alabama, the Honorable J. Ed Livingston, Chief Justice of the Supreme Court of Alabama and the Honorable Thomas S. Lawson, Robert T. Simpson, Davis S. Stakely, John L. Goodwin, Pelham J. Merrill and James S. Coleman, Associate Justices of the Supreme Court of Alabama, to show cause why a writ of mandamus should not be issued against them in accordance with the prayer of said petition and why your petitioner should not have such other and further relief in the premises as may be just and meet.

Petitioner states that the motion for leave to file and the petition for writ of mandamus annexed hereto are made as alternatives to the petition for writ of certiorari also annexed hereto which invokes the court's jurisdiction under Title 28, United States Code, § 1257(3) and is made in the event that the Court finds it more appropriate to exercise its jurisdiction by granting the writ of mandamus than by proceeding pursuant to certiorari.

ROBERT L. CARTER,
20 West 40th Street,
New York, New York,

THURGOOD MARSHALL,
10 Columbus Circle,
New York 19, New York,

ARTHUR D. SHORES,
1630 Fourth Avenue, North,
Birmingham, Alabama,
Attorneys for Petitioner.

CHARLES L. BLACK, JR.,
WILLIAM T. COLEMAN, JR.,
FRED D. GRAY,
GEORGE E. C. HAYES,
WILLIAM R. MING, JR.,
JAMES M. NABRIT, JR.,
LOUIS H. POLLAK,
FRANK D. REEVES,
WILLIAM TAYLOR,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1958

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, a Corporation,

Petitioner,

v.

STATE OF ALABAMA, *ex rel.* JOHN PATTERSON,
Attorney General.

PETITION FOR WRIT OF CERTIORARI AND/OR PETITION FOR WRIT OF MANDAMUS TO THE SUPREME COURT OF ALABAMA

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that pursuant to Title 28, United States Code, § 1257(3), a writ of certiorari issued to review the judgment of the Supreme Court of Alabama entered in the above entitled cause on February 12, 1959 and in the alternative, petitioner prays that pursuant to Title 28, United States Code § 1651(a), a writ of mandamus issue to the Supreme Court of Alabama and to the Honorable J. Ed Livingston, Chief Justice of the Supreme Court of Alabama and the Honorable Thomas S. Lawson, Robert T. Simpson, Davis S. Stakely, John L. Goodwin, Pelham J.

Merrill and James S. Coleman, Associate Justices of the Supreme Court of Alabama, directing and requiring the said Honorable J. Ed Livingston, Thomas S. Lawson, Robert T. Simpson, Davis S. Stakely, John L. Goodwin, Pelham J. Merrill and James S. Coleman to send down the mandate of this Court in this cause to the Circuit Court of Montgomery County and to order, direct and require that court to proceed to hold a hearing to determine on its merits the validity of the *ex parte* temporary restraining order and injunction, still in effect against petitioner, issued on June 1, 1956 barring petitioner from further activities in the state.

Opinions Below

On June 30, 1958, this Court handed down its opinion in this case reversing and remanding the decision of the Supreme Court of Alabama entered on December 6, 1956. 357 U. S. 449. On August 1, 1958, the mandate of this Court was sent down to the Supreme Court of Alabama (R. 32). On February 12, the Court below filed its opinion overruling petitioner's motion to send the mandate down and again affirmed the judgment of the Circuit Court of Montgomery County adjudging petitioner in contempt (R. 44). That opinion is set forth in the appendix here, *infra*, at page 11.

Jurisdiction

The judgment of the Supreme Court of the State of Alabama was entered on February 12 and a copy thereof is appended to this petition in the appendix at page 15, *infra*. Jurisdiction of this Court is invoked under Title 28, United States Code, § 1257(3). Jurisdiction is also invoked under Title 28, United States Code, § 1651(a), to aid in the exercise of this Court's appellate jurisdiction over state

courts granted under Title 28, United States Code, § 1257(3). Such jurisdiction has been exercised to secure compliance with a prior mandate of this Court, *City National Bank* v. *Hunter*, 152 U. S. 512; *Re Metropolitan Trust Co.*, 218 U. S. 312, and as a means of furthering justice in other kindred ways. *McCargo* v. *Chapman*, 20 How. 555, 557; *Ex Parte Bradley*, 7 Wall 364, 376. Exercise for either or both reasons would be appropriate in this case.

Questions Presented

1. May the Supreme Court of Alabama refuse to send down the mandate of this Court under the circumstances of this case?

2. May petitioner be deprived of access to the courts of Alabama to test the validity of an *ex parte* order, in effect ousting it from the state as a punishment for contempt, thereby rendering the *ex parte* temporary restraining order a permanent injunction, without petitioner's having been granted the right to a hearing in accord with requirements of due process of law?

Statement

This proceeding began on June 1, 1956 on the complaint of the then Attorney General, John Patterson. An *ex parte* order issued in effect forbidding petitioner from conducting any further business in the State of Alabama. The facts are set out in the opinion of this Court at 357 U. S. 449, and need not be repeated here.

On August 1, 1958, the mandate of this Court was sent down to the Supreme Court of Alabama (R. 32). On November 5, 1958, petitioner filed a motion in the Supreme Court of Alabama requesting it to forward this Court's

mandate to the Circuit Court of Mortgomery County. In this motion it recited that petitioner had been barred from doing business in Alabama since 1956 and that as long as the Circuit Court of Montgomery County had not received the mandate of this Court, petitioner would be barred from access to the courts of Alabama to contest on the merits the vital constitutional issues raised in this litigation (R. 34). On November 19, the petitioner renewed its motion (R. 36) and again on December 19 (R. 38). On February 12, the Court issued its order and judgment overruling the motion and affirming the judgment of the Circuit Court after remand (R. 44). The basis for the refusal of the Supreme Court of Alabama to follow the mandate of this Court is on the ground that the decision of this Court rests upon a mistaken premise. It is pointed out that petitioner was held in contempt for its "willful and deliberate refusal to produce the documents described in the former order of [the Circuit Court of Montgomery County] in this cause" and that there is nothing in the record upon which "to bottom a conclusion that petitioner has complied satisfactorily with the production order except for the membership lists".

Reason for Allowance of the Writ

1. The record in the Supreme Court of Alabama in this case and in this Court before remand was the petition for writ of certiorari filed by petitioner in the Supreme Court of Alabama (R. 1). In that record, petitioner recites that the court issued an interlocutory order and decree requiring petitioner to produce certain of the documents requested in the state's motion (R. 5). The interlocutory decree was set out (R. 19). The petition states that petitioner filed a motion to set aside the order to produce, which motion was overruled on July 25, 1956 (R. 7); upon its advising the court that petitioner was unable to comply, the court found and adjudged petitioner in contempt and levied a fine in

punishment therefor. The court's order is set out in the record (R. 7). On July 30, petitioner filed a motion to set aside or stay execution of the order pending review and with that motion tendered compliance with the court's order, except that it refused to give up its membership lists (R. 9-10). The petition recites specifically the action taken by petitioner in its effort to comply with the court's order except for filing its membership lists (R. 9-10). Despite this tender of July 30 in substantial compliance with the order, the court overruled petitioner's motion to set aside or modify its adjudication of contempt and refused to stay execution of its judgment pending review (R. 22). On July 31, it adjudged petitioner in further contempt (R. 12).

In its brief filed here the state stated at page 7:

> "Upon July 30, 1956, petitioner filed, with the trial court, a motion to set aside or stay execution of the contempt decree pending review by the Supreme Court of Alabama. Petitioner also tendered miscellaneous documents which it alleged to be substantial compliance. At all times the corporation refused to produce the names and addresses of its members. This motion was denied and petitioner then filed a motion in the Supreme Court of Alabama, requesting stay of execution of the judgment below pending review by the appellate court. * * *" (Brief and Argument for Respondent, page 7.)

In its opinion entered on December 6, 1956, dismissing the petition for writ of certiorari, the Supreme Court of Alabama stated: "On the last day that petitioner had to comply with the court's order or suffer the fine to be raised for refusing to comply, the petitioner offered to bring some of the documents into court but refused to fully comply with the order to produce. This offer of partial compliance by the petitioner was not accepted by the court. There-

after the court decreed that the fine be raised. * * * " (R. 24).

The record, therefore, conclusively establishes a basis for this Court's holding that the petitioner sought to comply with the court's order but for its membership lists and that the July 31 order of further contempt (R. 12) was based upon petitioner's refusal to supply the names and addresses of its members to the Attorney General. The holding below, therefore, that this Court misconceived the facts in issue here is not supported by the facts.

For these reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

2. The mandate of this Court has been in the Supreme Court of Alabama since August 1, and despite repeated motions by petitioner that Court refused (and failed) to send the mandate to the circuit court or otherwise act upon the mandate until February 12. Thus, between August 1, and February 12, a period of 5½ months, the Supreme Court of Alabama delayed further proceedings in this case and specifically refused to grant petitioner's motion to send this Court's mandate down to the circuit court so that petitioner could proceed to a hearing on the merits. On August 19, 1958 petitioner filed motions to set the matter down for hearing and to dissolve the restraining order in the Circuit Court of Montgomery County. No action on either motion has been taken by the circuit court as of the filing of this petition.

Petitioner has been and will continue to be denied access to the courts in the State of Alabama. It sought a hearing on the merits by filing the aforesaid motions in the circuit court and by requesting the Supreme Court of Alabama to send this Court's mandate down without delay. Petitioner has been effectively barred from operating in the state since June 1, 1956, without a hearing, a period of close to

three years. This case presents serious and grave due process considerations. See *Hovey* v. *Elliott*, 167 U. S. 409. In *National Union of Marine Cooks* v. *Arnold*, 348 U. S. 37, 43, this Court quoted with approval the language in *Hovey* v. *Elliott* to the effect that under the due process clause an inherent right of defense was secured against proscription as a punishment for contempt. That question is explicitly present here.

The history of this case makes obvious the fact that various stratagems, technicalities, distortions of fact and unvarnished delays have been applied and will continue to be applied in Alabama to frustrate petitioner's right to test the validity of its *ex parte* ouster in the courts of Alabama and to seek a review of this holding, if necessary, in an appropriate appellate court.

Unless this petition for writ of mandamus is granted, a hearing to test the validity of the *ex parte* so called temporary restraining order, the probability is that three years hence petitioner will still be effectively banned from Alabama without having been allowed to test the *ex parte* order on its merits.

Conclusion

WHEREFORE, for the reasons hereinabove stated, it is respectfully submitted that this petition for writ of certiorari should be granted and/or a writ of mandamus issue from this Court to the Supreme Court of Alabama and the Honorable J. Ed Livingston, Chief Justice of the Supreme Court of Alabama and the Honorable Thomas S. Lawson, Robert T. Simpson, Davis S. Stakely, John L. Goodwin, Pelham J. Merrill and James S. Coleman, Associate Justices of the Supreme Court of Alabama, requiring said Chief Justice and Associate Justices to show cause on a date to be fixed by this Court why a writ of mandamu

should not issue requiring and directing them to follow and send down the mandate of the Supreme Court of the United States in this cause to the Circuit Court of Montgomery County and ordering that court to proceed without delay to grant petitioner a hearing on the merits.

ROBERT L. CARTER,
20 West 40th Street,
New York, New York,

THURGOOD MARSHALL,
10 Columbus Circle,
New York 19, New York,

ARTHUR D. SHORES,
1630 Fourth Avenue, North,
Birmingham, Alabama,

Attorneys for Petitioner.

CHARLES L. BLACK, JR.,
WILLIAM T. COLEMAN, JR.,
FRED D. GRAY,
GEORGE E. C. HAYES,
WILLIAM R. MING, JR.,
JAMES M. NABRIT, JR.,
LOUIS H. POLLAK,
FRANK D. REEVES,
WILLIAM TAYLOR,
Of Counsel.

Appendix

Order and Decree of Supreme Court of Alabama of February 12, 1959

WHEREAS, the decree and order of this Court denying the Writ of Certiorari and Dismissing the Petition rendered on December 6, 1956, was reversed by the Supreme Court of the United States and the cause remanded to this Court for further proceedings not inconsistent with the opinion of the Supreme Court of the United States, as shown by the Mandate of the Supreme Court of the United States issued to this Court on August 1, 1958.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED, AND DECREED, since there is nothing in the record before this Court upon which this Court can base a conclusion that the Petitioner has apparently complied satisfactorily with the production order, except for the membership lists [it having been ruled the lists could not be required], and it being clear that the Petitioner is still in contempt for its failure to produce other "certain books, papers and documents" described in the lower court's order, that the judgment and decree of the Circuit Court, In Equity, be and is affirmed after remandment.

IT IS FURTHER CONSIDERED AND ORDERED that Petitioner's motion, praying that this Court will cause to be sent to the Circuit Court of Montgomery County, Alabama, the Mandate of the Supreme Court of the United States so that the Petitioner may proceed to have a hearing on the merits of the injunction issued by said Circuit Court, be and is hereby overruled.

IT IS FURTHER ORDERED that the costs of these proceedings be and are hereby taxed against the Petitioner, National Association for the Advancement of Colored People, a Corporation, for which costs let execution issue accordingly.

Opinion of Supreme Court of Alabama, Filed February 12, 1959

Per Curiam.

This cause comes before this tribunal on mandate from the Supreme Court of the United States, 357 U. S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 1163; this Court having previously denied certiorari, but having expressed its views as to the merits of the petitioner's claim of a constitutional right to refuse production of its membership lists. 265 Ala. 349, 91 So. 2d 214.

While the Supreme Court of the United States, in its opinion supra, seems to recognize its lack of jurisdiction over matters of state ("nonfederal") procedure, it nevertheless assumed jurisdiction quoad hoc ("for this turn", as that phrase has been sometimes defined), and this upon the premise that the interpretation by this Court of its own procedural rules was erroneous, or that petitioner was not sufficiently apprised of this Court's "novel" interpretation of those rules in the decision under review.

Lest there be no misapprehension on the part of the bench and bar of Alabama, we here reaffirm the well recognized and uniform pronouncements of this Court with respect to the functions and limitations of common-law certiorari, and the distinctions between that and other methods of review. 265 Ala. 349, supra. As we stated in *American Federation of State, County and Municipal Employees* v. *Dawkins*, 268 Ala. —, 104 So. 2d 827: "We cannot hurdle or make shipwreck of well known rules of procedure in order to accommodate a single case."

The decision of the Federal Supreme Court seems to have proceeded upon a hearing there, upon consideration of allegations there made, and upon showings or evidentiary matters and contentions, much of which were never before

this Court. It thereupon reversed the judgment of this Court and remanded the case for further proceedings "not inconsistent with" the opinion of that Court.

The first question before this Court on original consideration was whether or not there existed a prima facie right of refusal on the part of the petitioner. *Ex parte Boscowitz*, 84 Ala. 463, 4 So. 279. For the purposes of our decision we limited our opinion on the merits to petitioner's right of refusal to submit its membership lists. This question has been answered by the Supreme Court of the United States in the negative, by holding the petitioner to have a qualified right under the facts appearing before the Court, subject to an overriding interest of the State. The finding of that Court was to the effect that the State of Alabama had failed, at the hearing, to show such an overriding interest and ruled petitioner was not in contempt for failure to produce the lists.

This brings up the second question for review now, viz.: the scope of the order of the trial court and the facts apparent on the face of the record. Petitioner contends that it was held in contempt for refusal to produce its membership lists. As to the petitioner's right of said refusal, the Supreme Court of the United States, as stated, has settled that point, and no further discussion would be proper. However, petitioner's contention as to this sole reason it was held in contempt is not borne out by the record and the Supreme Court of the United States in its opinion, supra, seems to have rested decision on this mistaken premise. We wish to here point out that the record reveals that petitioner was held in contempt for "its willful and deliberate refusal to produce the documents described in the former order of the court in this cause" (orders dated July 25 and July 31, 1956).

Again the record before us shows: "... counsel for respondent objected to the motion to produce and the court

rules, as shown by its order on file, that certain books, papers and documents mentioned in the motion . . . should be brought into court . . . " (Order dated July 25, 1956).

The Supreme Court of the United States, as to the entire order to produce, stated: " . . . petitioner . . . has apparently complied satisfactorily with the production order, except for the membership lists. . . . These last items would not on this record appear subject to constitutional challenge, and have been furnished."

We cannot presume, as did the Supreme Court of the United States, that the petitioner did furnish the other items listed, in view of the finding of the circuit court on the face of its order that it did not; for, as we held in *Ex parte Dickens*, 162 Ala. 272, 50 So. 218 (and approved by the Supreme Court of the United States in its review): "Following the rules above stated, the chancellor has found the facts that said Dickens has not, in good faith, obeyed the orders of the court, but, on the contrary, has filed a false and fraudulent account; and we must take his finding as being correct. Those being the facts, said Dickens was properly adjudged to be in contempt. . . ."

There is nothing in the record here before us upon which we could bottom a conclusion *that petitioner has apparently complied satisfactorily with the production order, except for the membership lists.*

Being so—and pretermitting further discussion of the claimed contempt of petitioner for refusal to submit the membership lists—it is clear the petitioner is still in contempt for its failure to produce the other "certain books, papers and documents" described in the lower court's order, thereby necessitating another affirmance of the judgment.

Petitioner has filed a motion praying that this Court will cause to be sent to the Circuit Court of Montgomery County, Alabama, the mandate of the United States Supreme Court so that petitioner may proceed to have a hearing on the merits of the injunction issued by said Circuit Court.

It results from the foregoing considerations that the motion is not well taken and is overruled and the judgment is again affirmed.

MOTION OVERRULED AND JUDGMENT AFFIRMED AFTER REMANDMENT.

All the Justices concur.

FILE COPY

Office Supreme Court, U.S.
FILED
MAR 28 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 753

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, A CORPORATION,
Petitioner
VS.
STATE OF ALABAMA, ex rel. JOHN PATTERSON, ATTORNEY GENERAL

NO. 674 Misc.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
Petitioner
VS.
HONORABLE J. ED. LIVINGSTON, CHIEF JUSTICE OF THE SUPREME COURT OF ALABAMA, ET AL.,
Respondents

BRIEF AND ARGUMENT FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI and/or PETITION FOR WRIT OF MANDAMUS

MacDONALD GALLION
Attorney General
State of Alabama
Counsel For Respondent

JAMES W. WEBB
Assistant Attorney General
State of Alabama
Of Counsel

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	1
Statement of the Case	2
Argument	3
Conclusion	7

STATEMENT OF THE CASE

The facts, as set forth in the opinion of the Supreme Court of Alabama, dated February 12, 1959, (Ms. 3 Div. 779) are sufficient for a full determination of the only question properly presented to this Court.

On June 30, 1958, this Honorable Court reversed and remanded for further proceedings "not inconsistent with" the opinion of this Court a decision of the Supreme Court of Alabama. 357 U. S. 449 reversing 265 Ala. 349. The Supreme Court of Alabama having previously denied certiorari on procedural grounds, but having expressed their views as to the merits of the petitioner's allegation of a constitutional right to refuse to divulge membership lists, thereupon set about to review the case, as required in the mandate, and determine all questions within the breast of the Court pursuant to the mandate and the rules of law approved by this Court in its acceptance of certain Alabama authorities, i. e., **Ex parte Boscowitz,** 84 Ala. 463, and **Ex parte Dickens,** 162 Ala. 272.

The Alabama Supreme Court accordingly found, upon careful review of the record before it, that the petitioner had been held in contempt for: "its wilful and deliberate refusal to produce the documents described in the former order of the Court in this cause" (orders dated July 25, and July 31, 1956), not alone for failure to produce membership lists, as alleged by the petitioner. Therefore, applying the rules of **Ex parte Dickens,** supra, as directed by mandate, the Supreme Court of Alabama affirmed the cause. (Ms. 3 Div. 779)

ARGUMENT

JURISDICTION OF THE SUPREME COURT SHOULD NOT BE EXTENDED TO CASES DEVOID OF FEDERAL QUESTION.

The petitioner in this case has requested this Court to assume jurisdiction of this case simply because of the fact that this Court formerly decided one facet of the case, in spite of the fact that there is no longer a Federal question involved for this Court to review. This Court, in its opinion (357 U. S. 449) held primarily:

1. Alabama had misinterpreted its rules as to review of civil contempt by certiorari as opposed to mandamus.

2. The petitioner, National Association for the Advancement of Colored People, could claim the qualified right of secrecy and assembly for its members, in view of its nexus with them provided by the wording of the petitioner's Constitution.

3. In view of possible retaliation alleged by petitioner, the State must show an overriding interest to compel disclosure of petitioner's membership.

4. The State had failed to show such an overriding interest.

This Court accordingly issued to the Supreme Court of Alabama a mandate to proceed with the case in a manner not inconsistent with the opinion.

It must be recalled that the Supreme Court of Alabama had previously denied certiorari and refused to review the record on procedural grounds. 265 Ala. 349. As to that procedural ruling, the Court restated and reinstated, for the benefit of the Alabama bench

and bar, its rule for future cases as to the distinction between certiorari and mandamus. However, as to the case at bar, the Alabama Court proceeded to review the record in accordance with this Court's mandate.

In its review, the Alabama Supreme Court first took up the proposition of prima facie right to refusal on petitioner's part (**Ex parte Boscowitz,** 84 Ala. 463). It found, in view of this Court's opinion, that error existed in that portion of its previous opinion in which it held, for the future guidance of the parties, that the petitioner had no prima facie right to refuse to divulge its membership on request of the State. Accordingly, the Supreme Court of Alabama ruled that the petitioner did have a qualified prima facie right, subject to overriding interest of the State, but which the State had failed to sufficiently establish.

The second proposition taken up by the Alabama Court in its review were the orders and facts apparent on the face of the record before them. The order of the Circuit Court held the petitioner in contempt for failure to produce the books, records and documents previously requested. This order was apparent on the face of the record and made a part of the petition. The petitioner had alleged that all of the documents, with exception of membership lists, were offered, however, the record affirmatively shows to the contrary. Accordingly, the Supreme Court of Alabama, in following the rules of **Ex parte Dickens,** 162 Ala. 272, approved by this Court previously, affirmed the cause.

It should be noted that the position taken by the Alabama Court is not novel or unreasonable. It is as old as the common law itself and well supported by

Alabama authority. The Supreme Court of Alabama on certiorari simply may not upset a finding of fact by the trial court. This Court approved the **Dickens** case, supra, specifically, and a portion of that case reads as follows:

> "Following the rules above stated, the Chancellor has found the facts that said Dickens has not, in good faith, obeyed the orders of the court, but, on the contrary, has filed a false and fraudulent account; and **we must take his finding as being correct.** Those being the facts, said Dickens was properly adjudged to be in contempt, and it was within the power and jurisdiction of the court to order that he be imprisoned until he should comply with the orders of the court." (Emphasis supplied).

Petitioner contends, in effect, that where a mandate has once issued, this Court should thereafter review by certiorari or mandamus each subsequent ruling by the lower court contrary to the petitioner's likes, and thus forever retain jurisdiction of the cause. It further cites **City National Bank v. Hunter**, 152 U. S. 512 and **Re Metropolitan Trust Company**, 218 U. S. 212. These cases, however, hold quite contrary to the petitioner's views. Both are quite clear that mandamus is an incorrect remedy to compel the court below to decide a particular case in a particular manner, and that unless the mandate of this Court was of such a nature as to leave nothing to the judgment or discretion of the State Court, this Court will not now review by any such remedy. In fact, this Court, in its discussion as to the writ of mandamus, has gone further and held that mandamus, in the main, is restricted to situations where ministerial duties of a non-discretionary

nature are involved. Only where the matter is peradventure clear, where the agency is clearly derelict in failing to act, where the inaction or action turns on a mistake of law, then may the relief be afforded. **Panama Canal Company v. Grace Line,** 356 U. S. 309.

Clearly, in the case at bar, the Supreme Court of Alabama was left with discretion to act on the case. In fact, in view of its refusal to review the case in its first instance, the Alabama Court had to act and review the case in this instance on mandate, otherwise it becomes a nonentity. The position of the petitioner as to its motions to the Supreme Court of Alabama to forward the mandate to the Circuit Court without further ado would reduce the State Supreme Courts to mere forwarding agencies with no power, jurisdiction, or discretion, a mere rubber stamp. Such a position is untenable.

Could then certiorari be granted in this case? We think not. The review by the Supreme Court of Alabama was reasonable, fair, and based on sound principles of law. The mandate of this Court was followed to the letter and carefully attended in its most minute detail. The mandate directed the Supreme Court of Alabama to review the record by certiorari, keeping in mind that the petitioner, for the purposes of this appeal, did not have to produce its membership lists. This Court further approved **Ex parte Dickens,** supra, as a model or guide for review by certiorari, and, further held the other matters sought by the motion to produce not subject to constitutional objection, viz., legitimate items of inquiry. Accordingly, the Supreme Court of Alabama could do no more than affirm.

The United States Supreme Court has previously stated that on cases after mandate, where the case has

been disposed of devoid of Federal question, this Court will not review the cause. **Naim v. Naim,** 350 U. S. 985.

The respondent has never agreed, and does not now agree that the petitioner has complied with the trial court's order to produce with the exception of membership. The respondent, in fact, specifically denies that the petitioner has produced or offered to produce in all aspects except for lists of membership. As a result of its "brazen defiance," as stated by the Alabama Supreme Court, of the entire order to produce, the petitioner was held in contempt, (**Ex parte National Association for the Advancement of Colored People,** 265 Ala. 349, 352), and any proposition to the contrary is pure assumption on the petitioner's part, allegations based on imagination, not fact, and completely unsupported by the record.

One further matter deserves attention before a conclusion of argument, i. e., the continuous reference by petitioner to its "punishment" of contempt. The contempt in this case is a civil contempt and not a criminal contempt; the petitioner is being coerced, not punished in the strictest sense of the word. **United States v. United Mine Workers of America,** 330 U. S. 258; **Ex parte National Association for the Advancement of Colored People,** 265 Ala. 349. Certainly the petitioner has not been exiled as a punishment of contempt, as alleged, (page 9 of petition) and that portion of the petition is res judicata. **National Association for the Advancement of Colored People v. State of Alabama,** 357 U. S. 449.

CONCLUSION

The totality of the petition is that because the Alabama Supreme Court followed the mandate and

reviewed the case instead of immediately forwarding the mandate to the Circuit Court of Montgomery County, Alabama, as requested by the petitioner in its motions, (the petitioner filed no briefs) this Court should, therefore, in effect, ignore the State Supreme Court. Such a position is untenable, and, for the foregoing reasons, this petition should be denied.

Respectfully submitted,

MacDONALD GALLION
Attorney General
State of Alabama
Counsel for Respondent

JAMES W. WEBB
Assistant Attorney General
State of Alabama
Of Counsel

CERTIFICATE OF SERVICE

I, MacDonald Gallion, Attorney for the Respondent, The State of Alabama, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 27 day of March, 1959, I served copies of the foregoing brief in opposition on Robert L. Carter, 20 West 40th Street, New York, New York, by placing two copies in a duly addressed envelope, with air mail postage prepaid, in the United States Post Office at Montgomery, Alabama, and on Arthur D. Shores, 1630 Fourth Avenue, North, Birmingham, Alabama, by placing a copy in a duly addressed envelope, with first class postage prepaid, in the United States Post Office at Montgomery, Alabama.

I further certify that this brief in opposition is presented in good faith and not for delay.

Mac Donald Gallion

MacDONALD GALLION
Attorney General
State of Alabama
Montgomery, Alabama